IN THE HIGH COURT OF UTTARANCHAL, NAINITAL.

No. 10- COURT'S ORDER WHETHER THE CASE IS OR IS NOT APPROVED FOR REPORTING.

[Chapter VIII, Rule 32(2) (b)]

Criminal Jail Appeal No. 1703/2001
(Old No. 2205/1991)

Doji … Appellant.

Vs.

State .. Respondent.

Decided on 19-09-2005

~~A.F.R. (Approved for Reporting)~~
Not Approved for Reporting

(Irshad Hussain, J.)

(B.S.Verma, J.)

Dated: 19-09-2005.

In the High Court of Uttaranchal, at Nainital.

Criminal Appeal No. 1703/2001
(Old No. 2205/1991)

Doji S/o Nathu,

R/o Kesharipur Colony

P.S. Kashipur,

District Nainital .. Appellant.

Vs.

State .. Respondent.

Sri R.S. Sammal, learned Amicus Curiae for the accused.
Sri Amit Bhatt, learned A.G.A.

Coram: Hon'ble Irshad Hussain, J.
Hon'ble B.S. Verma, J.

Dated: 19-09-2005

(P.C.):

Accused Doji was charged under Section 302 I.P.C. for having committed the murder of Harkesh Singh at about 9 P.M. on 2-11-1989 in village Kesharipur, within the Circle of Police Station, Kashipur of District Nainital. On conclusion of the trial he was convicted and sentenced to imprisonment for life per judgment dated 22-8-1990 passed by the then III Additional Sessions Judge, Nainital ion sessions trial No. 47/1990.

2- Briefly stated the facts of the case as emerged from the F.I.R. and the evidence of the prosecution are as follows:

On 2-11-1989 at about 9 P.M. informant Ashrafi (P.W.1) was taking night meal in his house in the above mentioned village. As is evidence from the site-plan, Ext. Ka.3, Harkesh Singh deceased, the real brother of the informant also has his house in that enclosure where the house of the informant is situate. At that time accused Doji appeared at the entrance of the enclosure of these houses and started abusing the informant. On being reprimanded by Harkesh, the accused did not detract from making uncomplimentary remarks. When Harkesh cautioned the accused he was caught hold of by the accused and was given beating. The informant raised alarm attracting witnesses Harcharan and Man Singh there at that place and in the meanwhile the accused gave knife blows on the

person of Harkesh who sustained its injuries and fell then and there at that place. Harkesh was then being taken to Kashipur to provide him medical aid in the tractor of Devendra Singh but he breathed his last in the way itself.

3- What happened thereafter may be mentioned by stating that informant Ashrafi got scribed the written report, Ext. Ka.1 and delivered it at P.S., Kashipur and on its basis check F.I.R., Ext. Ka.7 was drawn the same day, that is, 2.11.1989 at 11.20 P.M. and relevant entry was made in the G.D. report No. 48 of the same date and time, Ext. Ka.8 to register a case under Section 302 I.P.C. against the accused. The investigation was taken up by S.I. Gajendra Singh (P.W.4), who after completing initial formalities of the investigation got the inquest held on the dead body in his supervision, by S.I. B.R. Yadav, who prepared the inquest report, Ext. Ka.9 and relevant documents, including the challan report, Ext. Ka.14 and diagram of the dead body, Ext. Ka.11. The packed and sealed dead body was dispatched for post mortem examination which was performed next day on 3.11.1989 at 1 P.M. by Dr. S.P. Srivastava (P.W.3) and post mortem examination report, Ext. Ka.2 was then prepared. The Investigating Officer also recorded the statements of the witnesses and arrested the accused on 5.11.1989 and on his disclosure statement, a knife, said to be the weapon of assault, was recovered from the bushes near the bank of 'Chirbut Ghaat' at a distance of 40 paces from the house of Devendra Singh. The Investigating Officer also prepared the site plan, Ext. Ka.3 of the place of the incident and also site-plan, Ext. Ka.6 of the place of the recovery of the knife. On completion of the remaining formalities of the investigation, charge sheet, Ext. Ka.5 was placed against the accused on 30-12-1989 by the Investigating Officer. The accused was thereafter sent up to stand the trial by the C.J.M., Nainital and the accused then faced the trial as stated above and was convicted and sentenced per judgment under appeal.

4- The accused did not admit the accusations of the prosecution and pleaded not guilty. He claimed to be tried. He gave out that although the death of Harkesh was caused but he was in his house

as he had returned after doing his day's labour work. He has thus shown complete ignorance about the incident.

5- At the trial, the prosecution to bring home guilt to the accused relied upon the evidence of four witnesses, including the two eye witnesses, the informant Ashrafi (P.W.1) and Harcharan (P.W.2). S.I. Gajendra Singh (P.W.4) investigated the crime as stated above and completed the necessary formalities briefly referred above besides proving that on the disclosure statement of the accused, knife, the alleged weapon of the assault, was recovered. The Autopsy Surgeon Dr. S.P.Srivastava (P.W.3) was examined to prove that on the basis of the post mortem examination the ante mortem injuries detected on the person of the deceased were as below:-

1- Incised wound 3cm x 1cm vertically placed on left side on neck, at the level of thyroid cartilage, 3cm away from midline.

2- Incised would 3cm x 1.5cm vertically placed on left side of chest, 5cm away from the left nipple, 6 O'clock position.

3- Incised wound 3cm x 1cm horizontally placed on right side of chest, 5cm away from right nipple at 5. O'clock position.

4- Incised wound 3cm x 1/2 cm x muscle deep on the left side of abdomen, 7cm away from umbilicus at 1 O'clock position.

On internal examination, pleura was found cut beneath injury Nos. 2 and 3 and blood was present in thoracic cavity. Right lung was cut at two places beneath injury No.3. Pericardium was also found cut beneath injury No.2 and so was the case with the left vertebrae of the heart, both the chambers of which were empty. There was about 4 ounces of semi-digested material present in the stomach and whereas semi-digested food and gases were present in the small and large intestine.

6- In the opinion of the medical officer death was caused due to shock and haemorrhage as a result of ante mortem injuries about a day ago. It may be recalled that the occurrence took place at about

9 P.M. on 2.11.1989 and the post mortem examination having been conducted next day at 1 P.M. the opinion of the medical officer probalized the time of the occurrence as alleged by the prosecution.

7- Learned Sessions Judge placed reliance on the direct evidence of P.W.1 and P.W.2 to come to a define conclusion that both these witnesses were most natural and probable witnesses of the occurrence and the occurrence having been witnessed by them in the light of the electric pole situate opposite to the 'Kharanja' in front of the enclosure of the house of the informant and the deceased there was no difficulty in fixing the identity of the assailant, the accused. Learned Sessions Judge rejected the contention of the defence that for want of examination of any of the immediate neighbour of the house of the informant and the deceased the evidence of the prosecution was not reliable and sufficient to prove the charge against the accused. No defect or infirmity in the investigation of the case was found to have been placed on record and therefore the learned Sessions Judge went on to accept the prosecution case in toto and, therefore, convicted and sentenced the accused as aforesaid.

8- We have heard the learned Amicus Curiae appearing on behalf of the accused and the learned A.G.A. and have carefully re-appreciated the evidence on record with the help of both learned counsel. We have also gone through the judgment under appeal with the help of these counsel.

9- There can be no doubt that the death of Harkesh was homicidal and he was given blows of the sharp edged weapon on the neck and chest, the most vital organs of the body with a clear intention to eliminate him. The evidence of the medical officer also reveals that these injuries were sufficient in the ordinary course of nature of cause the death and this was the reason that the medical officer vehemently denied to this suggestion of the defence that these injuries were not sufficient in the ordinary course of the nature to cause the death of the deceased. Considering the seat of the injuries given by a sharp edged weapon, we see no merit in the argument of the learned Amicus Curiae that the accused has had no

intention to commit the murder and further that he can not be attributed with the knowledge that the injuries inflicted will be sufficient to cause the death of the victim. Therefore, the case squarely fall under the clause- thirdly of Section 300 of the Indian Penal Code and whosoever caused these fatal injuries to the deceased had intended to commit his murder.

10- As is evidence from the statement of the accused under Section 313 of the Code of Criminal Procedure and further from the cross-examination of both the eye witnesses P.W.1 and P.W.2 the defence made an attempt to raise a doubt in the claim of the prosecution in regard to the identity of the assailant of the deceased. Keeping in view the stand taken at the trial the learned Amicus Curiae initially argued that absence of any source of light, in the written F.I.R., Ext. Ka.1, inquest report, Ext. Ka.9 and the statements of the witnesses recorded under Section 161 of the Code of Criminal Procedure by the Investigating Officer, leave no manner of doubt that the prosecution made a marked improvement in the evidence of the witnesses to show that there was source of light at the time of the incident and that in the totality of the circumstances of the case this aspect of the matter create grave doubt in the claim of the eye witnesses that they have had sufficient occasion or opportunity to fix the identity of the assailant at the time of actual assault on the victim during the night hours, that is, 9 P.M. Having gone through the evidence of P.W.1 and P.W.2 and the investigation aspect of the case we see no merit in the submission of the learned Amicus Curiae. Reason being that the occurrence took place when the informant Ashrafi was taking his night meal inside the house and at that time the source of light in the house itself was highly probable and if source of light present inside the house left to be mentioned in the written F.I.R. it will not tell adversely upon the credibility of the evidence of the informant. It is not in dispute that the accused was well known to the informant and his brother Harkesh deceased and also the independent eye witness Harcharan whose house is also situate not far off from the place of the incident as affirmed by the evidence of Investigating Officer, P.W.4, who gave out that the house of

Harcharan is situate about 50-60 paces towards south of the house of informant Ashrafi. Preceding to the actual incident of assault on the victim, the accused came at the entry of the enclosures of the house of the informant and the deceased and stated abusing the informant. By making uncomplimentary remarks, the accused had in fact registered his identity to the informant and others who were very well known to him and therefore there was no occasion for the informant and the others in taking mistaken identity of the person who came there and behaved in the indecent manner. It was then naturally on the part of the brother of the informant to intervene to desist the accused from behaving in this uncalled for manner. Harkesh deceased went at the entrance of the enclosures of the two houses and reprimanded the accused. The accused could not desist from making abuses and at that very moment he even started assaulting the deceased and also gave knife blows on his person to cause him serious injuries. Naturally on this occasion the informant was not expected to keep sitting and he at once came out when the initial scuffle or assault had taken place and in a situation like this it is difficult of find favour with the argument of the learned Amicus Curiae that the informant would not have reached at the entrance of the enclosure in time to see and find the known assailant wielding knife against his brother, the deceased. Therefore, the informant P.W.1 being the most natural and probable witness of the occurrence had been able to see the incident and fix the identity of the assailant , the accused and that too in the light of the electric pole situate just opposite to the ‘Kharanja’ in front of the enclosure of the houses, as also shown in the site plan, Ext. Ka.3. The informant was subjected to searching cross-examination but nothing of vital importance seems to have been brought on record as may assail his otherwise reliable testimony. Having re-appreciated the evidence of the informant we find ourselves in agreement with the view taken by the learned Sessions Judge that the informant was a truthful witness and his testimony in regard to the events of the incident, the identity of the assailant the accused, was reliable.

11- P.W.2, Harcharan was given the label of a chance witness by the learned Amicus Curiae on account of the case set up by the prosecution that this witness happened to reach there at the place of the occurrence while returning after doing his day's business of selling of vegetables and it was argued that it was not probable that a person who sells vegetables as a hawker could be said to be a natural and probable witness of the occurrence. As stated above the house of the witness is situate at a distance of about 50-60 paces from the place of the occurrence. It has come in the evidence of this witness that he was returning to his house after selling the vegetables from 'Kunda Chowk' and to return to his house he had to pass in front of the house of the informant. The village 'Kharanja' is situate in front of the house of the victim and the deceased and it was quite natural for the witness to take up that route from 'Kunda Chowk' to return to his house after doing his day's business and therefore in this peculiar aspect of the matter the witness can not be put the label of a chance witness.

12- Learned Amicus Curiae then pointed out to the statement of this witness that he had seen the victim Harkesh lying in a pool of blood and submitted that the witness reached there when the assault had already taken place and he was most probably not able to see the assailant of the victim at that time. We see no merit in this argument because while appreciating the evidence of a witness a random sentence can not be picked up from the evidence to support a particular argument. For just appreciation of the evidence of the witness the cumulative effect of the entire evidence has to be seen and therefore merely because the witness says that when he reached near the victim Harkesh he found the victim lying in a pool of blood cannot be taken to imply that the actual assault was not seen by the witness. The reason being that the witness has also categorically stated that at that time Man Singh was also with him and he saw that the accused Doji gave knife blows on the person of Harkesh and when he himself and Man Singh moved further towards that place accused Daji ran away from there. He also gave out that the time of the incident was about 9 P.M. Therefore, it is evident that he witness specifically claimed to have seen the actual

assault also and it cannot be said that he reached there at the place of occurrence only when the accused had already run away.

13- The testimony of these eye witnesses was also sought to be discredited by pointing out that both these witnesses have claimed that the accused and the victim scuffled for quite some time, say about 4-5 minutes and it was not probable that for such a long period of scuffle these witnesses have not intervened to pacify the quarrelled accused and the victim. On this account the learned Amicus Curiae wanted us to believe that both these witnesses were, in fact, not present at the scene of the occurrence. we see no merit in this argument because if such quarrel taken place there is always an element of surprise and the witnesses are taken aback and before they thing and decide to pacify the quarrelling persons the actual assault by weapon already taken place and the victim is not saved from the clutches of the assailant. The time as given cannot be also correct because by mere approximation or guess work the witness discloses the time during which there is scuffle. Therefore, if the witnesses say that scuffle took place for 4 or 5 minutes mean that scuffle was not necessary for that period and therefore this instance cannot safely be taken to belie and discredit the testimony of the witnesses.

14- It was the submitted that not a single resident of the adjoining houses was shown as eye witness of the occurrence although the evidence of P.W.1 and P.W.2 indicate that the neighbours were awake at the time of the incident and that there were large number of male members in the adjoining houses of Sher Singh and Laxman Singh also shown in the site plan, Ext. Ka.3 and this aspect of the matter indicate that the independent and natural witnesses have not been brought forward to corroborate the prosecution version. This aspect of the matter was also properly considered by the learned Sessions Judge who was of the opinion that merely on account of non-examination of a neighbour no adverse inference can be drawn against the prosecution and the evidence of the eye witnesses examined in the case could not be put to naught in regard to the incident of the case. in our view the conclusion drawn by the learned Sessions Judge was justified and

we also see no reason to disbelieve the otherwise reliable evidence of P.W.1 and P.W.2 on account of non-examination or non-citing of any of the witness of the two neighbouring houses of Sher Singh and Laxman Singh.

15- As regard the cause of crime it was submitted that the accused was alleged to be making uncomplimentary remarks against the informant and there was no occasion for the accused to have assaulted the deceased, the brother of the informant and this aspect of the matter indicate that the accused has had no motive to assault the victim Harkesh. The submission against does not appear to be sustainable because the accused having made uncomplimentary remarks against the informant it was quite natural for his brother Harkesh to appear at the entrance of the enclosures of the houses to caution and reprimand the accused so that the accused may behave nicely. The accused took it otherwise and started assaulting the brother of the informant and therefore it cannot be said that there was no motive for the accused to commit the offence. In other words the motive aspect of the case has also been sufficiently satisfied in this case.

16- Lastly, attention was drawn to the fact that the informant has admitted his acquaintance with Devendra Singh is whose tractor the victim was being shifted to the hospital from the place of the occurrence and it was argued that on account of the closeness with Devendra Singh the accused was falsely implicated as Devendra Singh was not in good terms with the accused. Nothing of substance could be brought on record to prove that Devendra Singh and accused were at loggerheads and even otherwise there is nothing on record to sustain the claim that the informant would falsely implicate an innocent instead of the real culprit only at the asking of his acquaintance Devendra Singh. It is well settled that a close relative would not let off the real culprit and falsely implicate an innocent and this is a guarantee that the informant rightly arraigned the accused for fatally assaulting his brother Harkesh.

17- According to the prosecution knife was recovered on the disclosure statement of the accused by the Investigating Officer on 5.11.1989, the date when the accused was arrested while coming on

a tractor. There is only the evidence of Investigating Officer P.W.4, in that regard and having gone through his evidence we are not satisfied that the ingredients of Section 27 of the Evidence Act were satisfied to prove the factum of recovery of knife. Under Section 27 of the Evidence Act the fact discovered is the object as a consequence of a statement given by the accused and to prove this it has to be seen that the accused claimed himself to be the author of the concealment of the object. We find that this ingredient of Section 27 of the Evidence Act was not satisfied by the evidence of the Investigating Officer because he has not proved that the accused gave out that he is the author of the concealment and volunteered that he will produce the object, the knife, from the place where it had been concealed after the commission of the crime. Even otherwise neither the knife was sent to serologist nor it was got exhibited in the evidence of the witness nor any independent witness of the recovery was examined by the prosecution and, therefore, we find it difficult to accept this part of the prosecution evidence. At any rate the absence of proof of the recovery of the knife would not entail rejection of the otherwise reliable direct evidence in the case as discussed above.

18- Upon re-appreciation of the evidence of the prosecution as discussed above we come to a definite conclusion that the prosecution evidence being reliable proved beyond doubt that the accused Doji and none other fatally assaulted the victim Harkesh by wielding knife at about 9 P.M. on 2.11.1989 in village Kesharipur of P.S. Kashipur. The accused was thus rightly held guilty, convicted and sentenced by the learned Sessions Judge.

19- In the aforesaid premises this appeal fails and is dismissed accordingly. The judgment dated 22-8-1990 convicting the accused under Section 302 I.P.C. and sentencing him to imprisonment for life is affirmed. He is in jail. He shall serve out the sentence awarded.

20- Let the record be sent back to the trial Court.

(B.S. Verma, J.) **(Irshad Hussain, J.)**

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